United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1012

~~74-8446~~

To be argued by
WILLIAM F. DOW, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-8446

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDWARD W. REED,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Questions Presented

1. Did the Court err in denying Defendant-Appellant's motion for new trials which motion was based on the claim that exculpatory evidence was suppressed by the Government and that there was newly discovered evidence?

   a. Did the Court err in finding that there were no undisclosed promises made by the Government to a prosecution witness?

   b. Did the Court err in finding that exculpatory testimony of a convicted co-defendant, offered by Defendant-Appellant as newly discovered evidence, was incredible and unworthy of belief and was not likely to produce an acquittal?

Statute Involved

RULE 33, FED. R. CRIM. P.

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-8446

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDWARD W. REED,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

Defendant-Appellant appeals from the denial of consolidated motions for new trials in three cases by the District Court (Clarie, *J.*). Reed's first claim, pursuant to 18 USC § 2255, was that certain exculpatory evidence was suppressed by the Government thereby denying him a fair trial in all cases. His second claim, pursuant to Rule 33, Fed. R. Crim. P., was that there was newly discovered evidence that would affect each of his convictions. After preliminary motions and argument, an evidentiary hearing on these claims was held on July 18, 25, 30 and 31, 1973. The motions were denied by Judge Clarie on March 4, 1974.

Statement of Facts

In his motion, Reed set forth two claims. First, he alleged that the Government made promises to Ralph Maselli in exchange for his testimony and that those promises were undisclosed to the defense. More specifically,

Reed claimed that Ralph Maselli's testimony at a subsequent state trial revealed that the Government had promised to give Maselli a sum of money, part of which was the proceeds of his bank robbery activities; furthermore, Reed claimed that Ralph Maselli had been promised that his brother, Matthew Maselli, would not be prosecuted if Ralph testified. Second, Reed alleged that subsequent to his bank robbery conviction, Edmund J. Devlin, a co-defendant, signed an affidavit on August 18, 1972, in which he swore that Reed did not commit the crime but that he, Devlin, had robbed the bank together with the two Maselli brothers.

A. History of the Cases

A federal grand jury charged Reed on May 26, 1969, with an interstate firearms violation (Crim. No. 12,522). On September 10, 1969, the grand jury handed down another indictment charging him with the robbery of the Fairfield Community Trust Company on January 9, 1969 (Crim. No. 12,580). On September 30, 1969, the grand jury returned two more indictments charging Reed with the robbery of the Atlantic National Bank on December 12, 1968 (Crim. No. 12,602) and the Colonial Bank and Trust Company (Crim. No. 12,604) on September 12, 1968.

On January 6, 1970, Assistant United States Attorney J. Daniel Sagarin commenced prosecution of the firearms charge (Crim. No. 12,522) before the Honorable William H. Timbers. A jury verdict of guilty was returned.

On January 20, 1970, Assistant United States Attorney Richard P. Crane, Jr. commenced prosecution of the Atlantic National Bank robbery (Crim. No. 12,602) before the Honorable M. Joseph Blumenfeld. Trial resulted in the acquittal of Reed by a jury.

On February 24, 1970, Sagarin commenced prosecution of the Fairfield Community Trust Co. robbery (Crim. No.

12,580) before Judge Timbers. A guilty verdict was returned.[1]

On March 16, 1970, Judge Timbers sentenced Reed in Crim. Nos. 12,522 and 12,580 to consecutive terms of five and twenty-five years respectively. Maximum committed fines were also imposed.

On April 15, 1970, Crane and Assistant United States Attorney F. Mac Buckley commenced prosecution of the Government's case in The Colonial Bank & Trust Co. robbery (Crim. No. 12,604) before the Honorable T. Emmet Clarie. After a guilty verdict was returned, Judge Clarie sentenced Reed on May 25, 1970, to a term of twenty years, under the provisions of 18 U.S.C. § 4208(a)(2), the term to run consecutively with the two sentences previously imposed by Judge Timbers. During all four trials, Reed was represented by appointed counsel, William F. Tiernan, Jr.

In sum, Reed was convicted in three cases (No. 12,522, No. 12,580 and No. 12,604) and in each case Ralph Maselli appeared and testified against him. The firearms conviction (No. 12,522) was summarily affirmed by this Court without opinion on January 22, 1971. The bank robbery convictions were affirmed on March 3, 1971, see *United States* v. *Reed,* 439 F.2d 1 (2d Cir. 1971) (No. 12,580) and on January 12, 1971, see *United States* v. *Reed,* 437 F.2d 57 (2d Cir. 1971) (No. 12,604). Reed was represented on all three appeals by appointed counsel, George A. Johnson.

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[1] Edmund J. Devlin, a co-defendant in No. 12,580, was a fugitive from October 1, 1969 until summer, 1970. He therefore was absent at the time of Reed's trial. On October 26, 1970, during jury selection, Devlin changed his plea before the Honorable James L. Oakes, then of the District of Vermont, sitting by designation.

B. Tracing the Money

During the investigation of a bank robbery unrelated to the ones with which Reed was charged, police in Hamden, Connecticut, applied for and executed state court search warrants for the residences of Ralph Maselli, his brother Matthew Maselli, and Arthur Murgo on November 9, 1969. These individuals were believed to have participated in the November 7, 1969, robbery of the Hamden Branch of the Second National Bank of New Haven.

A total of $5,646 was seized in Ralph Maselli's home. A total of $2,198 was seized from Matthew Maselli's apartment unit and basement, the sum comprising $1,127 in bills and approximately $208 in quarters from his apartment unit and $863 in consecutively numbered one dollar bills from the basement.[2] No money was seized at Murgo's residence. The seized money was retained by the Hamden Police Department, which shortly thereafter obtained arrest warrants for the trio.

On November 12, 1969, the Second National Bank, victim of the November 7 robbery, loaned to the Hamden Police Department $2,700 for the purpose of allowing them to recover from the South Norwalk Savings Bank monies then believed to have been stolen from the Hamden bank and exchanged at the South Norwalk bank on November 8, 1969. After the recovery was effected, Hamden police had custody of $10,544, comprising $7,844 seized from the Maselli brothers and $2,700 recovered from the South Norwalk Savings Bank and held as possible evidence.

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[2] Based on testimony that AUSA Crane did not obtain quarters from the Hamden police on August 31, 1970, exhibits showed that Hamden police had $208 in their custody over the amount turned over to Crane, and FBI Agent Connolly testified that Hamden police had approximately $210 in quarters. The $863 represents the remainder of $2,198 less $1,127 and the quarters.

Hamden police maintained sole custody and possession of the money until August 31, 1970, when AUSA Crane, accompanied by Deputy United States Marshal Anthony Dirienzo, received $10,336 from the Hamden police, the money representing all of the money then held except the quarters.

On September 2, 1970, Crane returned $2,700 to the Second National Bank in Hamden since the money could not be traced to that robbery and, in any event, was not needed as evidence. On the same day, Crane returned to Matthew Maselli $1,127, representing the bills seized in his apartment unit, but not including either the quarters or the bills seized in his basement, both conceded by Matthew Maselli to be the proceeds of his brother's bank robbery activities.

On September 28, 1970, Crane returned to Ralph Maselli, through Matthew Maselli, $1,000 of the money seized in Ralph Maselli's residence, the latter being held in protective custody and therefore unable to receive it personally. The remaining money was held by the United States Attorney's Office until June 13, 1973, when it was turned over to the United States Marshal's Office for safekeeping.[3]

C. Ralph Maselli's Testimony

During the summer of 1969, John Cassidento, J. Daniel Sagarin, and Richard P. Crane, Jr., were Assistant United States Attorneys for the District of Connecticut, working

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[3] Since the Government thus accounts for $10,337 ($2,700 + $1,127 + $1,000 + $5,510), it is apparent that there was a one dollar counting error, either in the transfer from Hamden police to Crane or from Crane to Matthew Maselli. Although the Government cannot account for the quarters retained by the Hamden police, they were never returned either to the Maselli brothers or to the United States Government.

together in the New Haven office (H 169).[4] Although the men had a general interest in each other's cases, Cassidento had had sole responsibility, until he left the office in September, 1969, for the prosecution of a series of bank robberies involving Edward Reed and others.

After Ralph Maselli and Reed were arrested in Tarrytown, New York, in May, 1969, Cassidento became aware that Maselli, in conversations with FBI Special Agent Raymon Connolly and New Haven Police Chief Inspector Stephen Ahern, had expressed an interest in cooperating with the Government (H. 158). Recognizing that protection of Maselli might pose special problems, Cassidento contacted federal Strike Force officials (H 159). The ultimate result of the negotiations was that Cassidento agreed that Ralph Maselli would not be prosecuted for any of the many bank robberies in which he was or might be implicated, in return for his truthful testimony (H 165). He would also be afforded such protection as might be necessary.

During Cassidento's initial negotiations with Ralph Maselli and contacts with Strike Force officials, none of the discussions concerned return of any of the seized monies, which were still in state custody (H 163). When Maselli later raised the money question, Cassidento told Connolly and Maselli that the money would be returned provided that it was not part of the bank loot (H 167). With re-

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[4] Since several transcripts are referred to in this brief, it is necessary to devise a somewhat artificial method for describing them. For purposes of this brief, the following "code" is used: (H ——) refers to the transcript of the hearing in these motions on July 18 and 25; (JDS ——) refers to the testimony of J. Daniel Sagarin on July 31, 1973, which was not paginated consecutively to the transcripts of July 18 and 25; (RS ——) refers to Reed's sentence transcript of March 16, 1970; (DP ——) refers to the transcript of Devlin's guilty plea on October 26, 1970; (12,604- ——) refers to the page of the transcript of an original criminal case, e.g. No. 12,604.

gard to monies seized in Matthew Maselli's apartment building and which were conceded to be tainted, Cassidento was certain that they could not be returned, among other reasons because the Government would be exposed to civil liability under such circumstances (H 167-168).

Ralph Maselli told Cassidento, while he was still an Assistant United States Attorney, that the money seized in his residence was won by him at gambling (H 171). Cassidento had knowledge that Ralph gambled heavily (H 171) and further tended to credit that explanation, in part because he had admitted that some of the money seized could be traced to a bank robbery (H 179). Cassidento never told Sagarin or Crane that Ralph Maselli was entitled to the return of the money even if it could be traced to a bank (H 170), and, after he left the office, he played no role in the actual return of the money (H 188).

Sagarin took over responsibility for the Reed cases in September, 1969, but had not participated in the original negotiations with Ralph Maselli concerning the return of the money (JDS 4). Preparing for the first trial (12,522), Sagarin interviewed Maselli for several hours around Christmas, 1969 (JDS 7). Sagarin anticipated disclosure of consideration promised Maselli in return for his testimony and reviewed the subject with him (JDS 9).

When Sagarin learned of Maselli's interest in the seized money and after some discussion, he specifically explained to Ralph that he would be entitled only to money which could not be traced to a bank robbery (JDS 9). Sagarin believed that Maselli's right to the money would have to be determined as a matter of law, regardless of his cooperation, and did not disclose their understanding during the trial because he did not believe it to be a matter of "consideration" for Ralph's testimony (JDS 12, 13).

Ralph told Sagarin, as he had told Cassidento, that the money was from gambling, not from bank robberies, and

Sagarin attempted to corroborate the explanation through Arthur Murgo, then also in protective custody, and through the FBI (JDS 9, 10). In due course, Sagarin was informed by the FBI that the money could not be traced to a bank robbery (JDS 10).

Crane learned of the understanding regarding the seized money after he assumed some of the responsibility for the cases. Having been assured by the FBI that the money could not be traced to a bank robbery, Crane returned to Matthew Maselli the untainted $1,127 taken from his apartment. He also returned $1,000 to Ralph Maselli, whose family was in great need of funds while Maselli was in protective custody.

At the hearing, Ralph Maselli again denied that the money seized in his house was bank robbery money, insisting that it was his (H 97, 127). He clarified testimony he had later given in a state court trial and claimed to be the basis for the new trial motions in the District Court, explaining that he had understood his testimony to mean that he had not been allowed to keep bank robbery money, but had received some of the money confiscated from his house (H 129, 130). Matthew Maselli testified that Crane told him, upon the return of some of the money, that the remainder would be returned if it were not bank robbery money (H 215). Matthew Maselli accordingly did not expect and does not expect the return of the quarters or the money seized in his basement, since they are tainted (H 222, 223).

D. Reed's Sentence and Testimony

On March 16, 1970, at the time Reed was sentenced in 12,522 and 12,580, defense counsel William F. Tiernan, Jr. argued in mitigation that "no actual physical violence was done to any of the customers or tellers . . . and that Reed committed no acts of violence" in connection with the gun

case (RS 5). Tiernan also noted that Reed "did not take the stand in [an] attempt to further complicate the matter . . . by way of what might have been considered perjury." (RS 6). A few moments later, Reed exercised his right allocution to complain that one of the jurors had a preconceived opinion of the outcome of his case (RS 9),[5] but he specifically declined Judge Timbers' invitation to comment on "any other fact relevant" to the cases (RS 10).

In addition to the regular imposition of sentences in the two cases, Judge Timbers ordered Reed to reimburse the Government for all attorneys' fees and expenses incurred under the Criminal Justice Act because the "specific and uncontradicted" evidence was that Reed received $17,000 for the Fairfield Community Trust Company bank robbery (12,580) plus a share of the so-called legal expenses totalling $15,000 (RS 25). Reed thereafter declined again to make any comment to Judge Timbers concerning the cases (RS 34).

Reed conceded at the hearing that he had not claimed to be innocent of either charge during his pre-sentence interview with federal probation officers, although he knew that Judge Timbers had a reputation as a stern sentencing judge and that the pre-sentence report would be considered in imposing sentence.

On May 25, 1970, when Reed appeared before Judge Clarie for sentencing in 12,604, Reed gave no indication of his innocence in any of his three cases, and requested only that the court consider that any sentence imposed in 12,604 run concurrently with the thirty years previously imposed by Judge Timbers (12,604—1170).

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[5] This concern subsequently became the subject of a motion for a new trial, which was denied by Judge Timbers on April 27, 1970, *United States* v. *Reed*, 313 F. Supp. 451 (1970).

E. Devlin's Plea and Testimony

At the hearing on the motions, Devlin admitted that he had been convicted in 1952 for attempted robbery with violence, in 1954 for theft of money, in 1956 for armed robbery, in 1967 for intent to cheat and defraud, in 1970 for bank robbery and bond jumping, and in 1971 for contempt of court (H 47, 48). He is currently serving consecutive sentences totalling twenty-two and one-half years (H 49).

He has known Edward Reed for about fifteen years, was friendly with him in 1969 and, although he has not seen him since 1969, has not been on friendly terms with him since then (H. 50). Devlin knew as early as September, 1969, while he was a fugitive in 12,580, that his co-defendant Reed was incarcerated on the charge in 12,580 and specifically knew that Reed was still in jail on October 26, 1970, when he appeared in Hartford before Judge Oakes to plead guilty. Prior to accepting the guilty plea, Judge Oakes explained to Devlin that the indictment charged that he, together with Edward Reed, Ralph Maselli and Arthur Murgo had robbed the bank in South Norwalk on January 9, 1969 (DP 14). When Assistant United States Attorney F. Mac Buckley made an offer of proof in connection with the guilty plea, he inadvertently said that Maselli, Devlin and *John* Reed (Edward Reed's brother) had entered the bank (DP 21). He was immediately corrected by Devlin's attorney, Joseph A. Licari, Jr., and Buckley noted that it was indeed *Edward* Reed who entered the bank on that day (DP 22).

At no time during the plea of guilty or at the time of sentence did Devlin indicate to the Court either that Edward Reed was innocent of the charge or that Matthew Maselli was implicated in the robbery (H 55, 61). Shortly after entering the guilty plea, Devlin met with Buckley, but did not indicate that his friend Reed was innocent of the charge (H 58). Nor did he mention it to a probation offi-

cer who interviewed him in preparation of a presentence report (H 59). Although Devlin claims to have been mad that Matthew Maselli was not being prosecuted for the bank robbery (H 60), Devlin told no one but friends who were incarcerated with him in Atlanta that Edward Reed was not involved in the bank robbery until August, 1972, when he prepared an affidavit in this case.

ARGUMENT

I.

The trial court properly denied Appellant's motion for new trials.

a. There is ample evidence to support the court's finding that there were no undisclosed promises made by the Government to Ralph Maselli in exchange for his testimony.

After a lengthy evidentiary hearing and the submission of briefs by counsel, the District Court found that the Government through its agents had made no promises to Ralph Maselli that he would have returned to him the bank robbery proceeds from the seized money. The court further found that there were no undisclosed promises by the Government concerning the prosecution of Matthew Maselli, that this matter had been fully explored at trial and that the jury had in no way been misled by the testimony.

It is the burden of the movant to prove claims of undisclosed promises, *Johnson* v. *Zerbst,* 304 U.S. 458 (1938); *Papalia* v. *United States,* 333 F.2d 620, 621 (2d Cir. 1964), *cert. denied,* 379 U.S. 838 (1964), and the findings of the trial court on that issue must be accepted on review unless clearly erroneous. Rule 52(a), Fed. R. Civ. P.; *United States ex rel Wissenfeld* v. *Wilkens,* 281 F.2d 707, 713 (2d

Cir., 1960); *Zovluck* v. *United States,* 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied,* 405 U.S. 1043. The Court in this instance found that Appellant did not sustain its burden and that finding is supported by the record and not clearly erroneous. The testimony from all three former Assistant United States Attorneys involved in the prosecution of Edward Reed refuted his claims and the Court chose to credit their testimony. There is also ample support in the record for the Court's finding that all promises made in regard to Matthew Maselli were disclosed to the defense. Furthermore, at the evidentiary hearing, Ralph Maselli removed any existing ambiguity about his testimony in state court concerning the return of money to him by the Government for he explained that the money returned was rightfully his and not the proceeds of a bank robbery. (H 129-130). Moreover, the trial Court properly concluded that the defense had sufficient opportunity to fully examine all of the Government's negotiations with Ralph Maselli when he testified at the trial. Appellant cannot contend on this record that the findings of the trial court were clearly erroneous.

b. The trial judge employed the proper criteria in assessing the claim of newly discovered evidence and his finding that the application of these criteria required a denial of the motion for a new trial is not clearly erroneous.

The function of the trial court in addressing a motion for a new trial pursuant to Rule 33 was most recently reiterated by this Court in *United States* v. *Zane, et al.,* — F.2d — (2d Cir. 1974) (Slip Op. Nos. 110, 114, decided November 4, 1974):

> In the exercise of his discretion the trial judge must determine whether there is a showing: (1) that the evidence could not with due diligence have been discovered until after the trial; (2) that the evidence is material to the factual issues at the trial and not

> merely cumulative and impeaching; and (3) that the evidence would probably produce a different result in the event of a new trial. *United States* v. ***Birrell,*** 482 F.2d 890, 892 (2d Cir. 1973); *United States* v. *DeSapio,* 456 F.2d 644, 647 (2d Cir.), *cert. denied,* 406 U.S. 933 (1972); *United States* v. *Polisi,* 416 F.2d 573, 576-77 (2d Cir. 1969).
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> **Slip Op. at pp. 229-230**

Upon review, the appellate court must determine whether the trial court properly applied those standards and whether the finding that this application required a denial of the motion was clearly erroneous. The Government submits that it is eminently clear from the record that the trial court applied the proper criteria to the claim of newly discovered evidence and that the denial of a new trial was not clearly erroneous.

Reed's claim for a new trial is addressed to his conviction for bank robbery in Criminal No. 12,580, and is based on an affidavit of his convicted co-defendant, Edmund J. Devlin, to the effect that Reed was innocent but that he, Devlin, committed the crime together with Ralph and Matthew Maselli. Reed testified extensively to this effect at the evidentiary hearing (H 2-76). After hearing this testimony and reviewing the transcripts of the original trial, Judge Clarie found Devlin's story incredible. Of course Judge Clarie was able to judge Devlin's credibility from his observation of the testimony at the motions hearing, but there are additional, objective factors which support his finding. Devlin is presently serving twenty-two years for armed bank robbery and bail jumping; furthermore, he has several prior felony convictions. Additionally, he and Edward Reed had been friends for about fifteen years and he is also a close friend of John T. "Jackie" Reed, Appellant's brother. In fact, it was after he had been incarcerated in Atlanta and had come into contact with Jackie Reed that he signed an affidavit alleging Edward Reed's innocence

(H 61-63), and this occurred almost two and one-half years after Appellant's conviction and some twenty months after Devlin's own sentencing. At the time of Devlin's guilty plea, in fact, the prosecutor misspoke when proffering the facts upon which the plea was based and indicated that John Reed robbed the bank together with Devlin and Maselli and was then corrected by Devlin's counsel. The prosecutor then corrected himself and stated that Edward Reed had acted together with Devlin, yet Devlin at no time indicated to the presiding judge that Edward Reed was innocent, nor that Matthew Maselli was involved (DP 22). Nor did Devlin made any similar statement to an Assistant United States Attorney with whom he spoke or to the United States Probation Officer who interviewed him.

Once having found Reed's testimony incredible, the trial Court applied the standards articulated by this Court in *Zane, supra,* and found that the testimony of Edmund Devlin would not be likely to produce an acquittal or any result different from the conviction of Edward Reed. That finding finds full support in the record and is not clearly erroneous.

CONCLUSION

For all the foregoing reasons, the motion for new trials was properly denied and it is respectfully urged that the decision of the District Court be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 7408446

UNITED STATES OF AMERICA

Appellee

v.

EDWARD W. REED

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 10th day of February, 1975, deponent served the within Brief for the Appellee upon Victor Fasano, Esq. 109 Church Street (P.O. Box 289) New Haven, Connecticut

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

ALBERT SENSALE

Sworn to before me,

This 10th day of February 1975

Michael Silberzweig

MICHAEL SILBERZWEIG
COMMISSIONER OF DEEDS
City of New York 2-1465
Certificate filed in Kings Coun
Commission Expires Sept. 1, 1975